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In The

Supreme Court of the United States

SEMINOLE ENTERTAINMENT, INC.
d/b/a RACHEL'S,

Petitioner,

vs.

CITY OF CASSELBERRY,

Respondent.

On Petition For Writ Of Certiorari To The Florida Fifth District Court Of Appeal

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the procedural safeguard of "prompt judicial review" for prior restraints of First Amendment freedom of speech mandated by this Court in *Freedman v. Maryland*, 380 U.S. 51 (1965) and *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990) requires the City of Casselberry's Adult Entertainment Code provide for a prompt judicial determination of license revocation challenges, as ruled by the Fourth, Sixth, Ninth and Tenth Circuit Courts of Appeal, or only prompt judicial access, as ruled by the court below and the First, Fifth and Eleventh Circuit Courts of Appeal?

2. Whether Rachel's due process rights were violated when the Casselberry City Commission refused to disqualify itself from presiding over Rachel's revocation hearing where the record was replete with evidence establishing bias against the nightclub?

PARTIES TO THE PROCEEDING

The parties listed in the caption are the only parties to the proceeding, specifically the City of Casselberry, Florida and Seminole Entertainment, Inc. Pursuant to Sup.Ct.R. 29.6, Seminole Entertainment, Inc. has no parent corporation. No publicly held company owns any of the stock of Seminole Entertainment, Inc.

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Seminole Entertainment, Inc., respectfully requests this Court to issue a writ of certiorari to review the judgment of the Florida Fifth District Court of Appeal in this case.

OPINIONS BELOW

The state circuit (trial) court denied Rachel's petition for writ of certiorari on July 17, 2001. This opinion is reported as *Seminole Entertainment, Inc. v. Casselberry*, 8 Fla.L.Weekly Supp. 613a (Fla. 18th Jud. Cir. 2001) (App. C). Rachel's sought review of the trial court's decision by filing a petition for writ of certiorari in the District Court of Appeal of Florida, Fifth District. The opinion of the Fifth District Court of Appeal is reported as *Seminole Entertainment, Inc. v. Casselberry,* 813 So.2d 186 (Fla. 5th DCA 2002) (App. A). On December 30, 2002, the Florida Supreme Court declined review of the Fifth District Court of Appeal. (App. D). The declination is reported as *Seminole Entertainment, Inc. v. Casselberry,* 835 So.2d 269 (Fla. 2002). A related case is reported as *Seminole Entertainment, Inc. v. Casselberry*, 811 So.2d 693 (Fla. 5th DCA 2001) (App. B).

STATEMENT OF JURISDICTION

The opinion of the Fifth District Court of Appeal was entered on March 22, 2002 (App. A). On December 30, 2002, the Florida Supreme Court declined review (App. D).

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257.

CONSTITUTIONAL PROVISIONS AND ORDINANCES INVOLVED

Amendment I of the United States Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment V of the United States Constitution:

> No person shall be held to answer for capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section 1, Amendment XIV of the United States Constitution:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the

> privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

City of Casselberry Adult Entertainment Code:

The relevant portions of the City of Casselberry Adult Entertainment Code are set forth in the Appendix (App. E-F).

STATEMENT OF THE CASE

A. FACTUAL AND PROCEDURAL BACKGROUND

This case presents two constitutionally significant issues. First, courts across this country (both federal and state) are divided as to whether the "prompt judicial review" provisions of adult entertainment/licensing codes must provide for the prompt judicial determination or only prompt judicial access. Here, Rachel's was entitled to prompt judicial review or, at a minimum, an automatic stay from Casselberry's order revoking Rachel's license.[1] Second, a legislative body (while acting in a quasi-judicial capacity) should be required to disqualify itself when strong evidence exists establishing bias against a party – in this case, the adult entertainment nightclub.

[1] Businesses which offer erotic dancing are afforded protection under the First Amendment. *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000); *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1974).

Rachel's has been a licensed adult entertainment establishment in the City of Casselberry, Florida for over ten years offering erotic dancing for the enjoyment of its patrons. In June of 1999, Casselberry passed an ordinance regulating adult entertainment in Casselberry and providing for suspension and/or revocation of adult entertainment licenses (hereinafter referred to as "the Code" or the "Casselberry Code"). Up until January 31, 2001, Rachel's held and maintained an adult entertainment license under the Casselberry Code. Its license was never previously suspended.

An undercover police investigation occurred at Rachel's in the summer of 2000. A number of people were arrested and prosecuted. On November 10, 2000, Casselberry issued Rachel's a Notice of Revocation of Adult Entertainment License as the result of alleged criminal conduct discovered pursuant to the undercover investigation. The Notice was amended by Casselberry on November 14, 2000. Rachel's filed a challenge to the revocation and requested a hearing on or about November 21, 2000. Casselberry's code is unique in that the city manager (who works for the city commission) acts as the prosecutor, and the city commission acts as the jury. The mayor acted as both the judge and a member of the jury.[2]

On December 4, 2000, Rachel's moved to disqualify the City Commission and Mayor. In support of its motion, Rachel's submitted substantial evidence of the bias and prejudice of the mayor and other Commissioners, especially

[2] The Casselberry Code's revocation and suspension provisions are contained in §§14-92 and 14-93, set forth in App. E and F respectfully.

Commissioner Henson.[3] On December 14, 2000, Casselberry denied Rachel's Motion. Hearings on the revocation were held by the City Commission on December 14, 27, and 28, 2000. During the hearings, the Mayor acted as the judge and participated in the revocation decision. The City Manager prosecuted the revocation case. On January 16, 2001, the City Commission began its deliberations. On January 31, 2001, the City Commission entered its findings of fact and conclusions of law finding purportedly by clear and convincing evidence that the ordinance had been violated; that the owners of Rachel's were negligent and failed to adequately supervise the business; and inferred that the owners fostered, condoned or negligently overlooked the violations. The City Commission further found that the "operators" and "workers", as defined in the Casselberry Code, knowingly allowed the violations and therefore the licensee violated the Casselberry Code. Rachel's license was revoked for two years, beginning February 1, 2001.

In response, Rachel's filed two legal actions. Initially, Rachel's filed an original action in Florida state circuit court against Casselberry seeking a declaratory judgment and injunction. Rachel's then filed the instant action with

[3] Commissioner Henson eventually disqualified himself in January of 2001, but not until after he actively participated in the revocation proceeding, voted to deny the motion to disqualify, and extensively questioned witnesses in support of the city manager's case. The remaining commission members, including the mayor, voted to revoke Rachel's license.

the state circuit court seeking certiorari review of Casselberry's revocation of Rachel's license.[4]

In the declaratory judgment action Rachel's moved for a temporary injunction to stay the revocation of its license. The motion was denied and an interlocutory appeal was filed with the Florida Fifth District Court of Appeal. In a unanimous decision, the court found that Rachel's due process rights had been violated because the Casselberry proceedings were so infected with bias. (This opinion is hereinafter referred to as "Rachel's I"). In reaching its decision, the court noted:

> The evidence supporting the motion to disqualify showed that the Casselberry mayor (Pronovost), who subsequently presided over the proceedings and ruled upon legal objections to proffered evidence and testimony, had run for office on a platform directed against alleged "illegal activities" at "strip bars" in Casselberry, such as Rachel's. The mayor had publicly charged that Rachel's was a hot spot of drug proliferation, under-aged drinking, and prostitution. Prior to the hearing, the Casselberry city manager, acting as the prosecutor of the case against Rachel's, had consulted with various commission members about the illegal activities at Rachel's. The motion to disqualify also asserted that one commissioner (Henson) actually participated in an undercover

[4] Two actions were filed by Rachel's due to the procedural dichotomy established by Florida Courts. Under Florida law, review of a city or administrative quasi-judicial action is generally made through certiorari review in a Florida circuit (trial) court. In contrast, facial challenges to an ordinance may be made in an original declaratory judgment action.

> investigation by the Casselberry police against Rachel's. (note omitted).[5]

Seminole Entertainment, Inc. v. Casselberry, 811 So.2d 693, 695 (Fla. 5th DCA 2001) (App. B). The court further observed that:

> Virtually all objections raised by Rachel's were overruled by Pronovost; those by the city manager were inevitably sustained. Considerable testimony was presented about illegal activity at a different nightclub located in Orange County. Significantly, the principal witness for the City, one Laney, refused to answer an inquiry by counsel for Rachel's in regard to any information showing that the owners of Rachel's had knowledge of any illegal activities on the premises. The basis for this refusal was that any such information was part of an ongoing investigation. The mayor then improperly sustained the City's objection to further cross examination by Rachel's in this regard.

Seminole Entertainment, Inc. v. Casselberry, 811 So.2d 693, 695 (Fla. 5th DCA 2001) (App. B). Based upon the record, the Court concluded:

> In this case, Rachel's has established more than mere political bias or an unfriendly political atmosphere. In effect, it was denied the right to challenge, through cross examination, the testimony of the principal witness against it. The evidentiary rulings by May Pronovost were not merely erroneous but rather reflect a bias so pervasive as to

[5] Extensive evidence was contained in the record supporting this quote from the Rachel's I court.

> have rendered the proceedings violative of the basic fairness component of due process.

Id. at 696-97. The court accordingly reversed the denial of the motion for temporary injunction. (App. B).

While the appeal in Rachel's I was pending but before the opinion was entered, the trial court in this action denied Rachel's petition for writ of certiorari finding that no due process violations occurred and rejecting Rachel's argument under *Freedman v. Maryland*, 380 U.S. 51 (1965). (App. C). Rachel's sought review of the denial of the writ by filing a petition for certiorari with the Florida Fifth District Court of Appeal. (Hereinafter referred to as "Rachel's II"). A different panel of the Fifth District Court of Appeal denied relief. (App. A). The majority of the Rachel's II panel found, among other things, that its scope of review was limited in a "second-tier" certiorari review and that effectively, the trial court review was the sole relief available to Rachel's for its due process arguments related to the Casselberry proceedings. In denying Rachel's relief, the Rachel's II panel ignored the opinion of the Rachel's I panel claiming the Rachel's I opinion should not have been rendered on procedural grounds. Judge Cobb, a member of both panels, dissented in Rachel's II (App. A). The Supreme Court of Florida declined review of the case. (App. D).

B. PRESENTATION OF FEDERAL ISSUES

The issue of whether the procedural safeguard of "prompt judicial review" for prior restraints of First Amendment freedom of speech mandated in *Freedman* and *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990) requires a prompt judicial determination was originally

presented to the Florida trial court in Rachel's Petition for Writ of Certiorari. (App. G, 99-111). The trial court rendered its opinion in this issue in its July 17, 2001 Order. (App. C). Rachel's presented this issue to the Florida Fifth District Court of Appeal who addressed the issue in its opinion at *Seminole Entertainment, Inc. v. City of Casselberry*, 813 So.2d 186, 189 (Fla. 5th DCA 2002). (App. A).

The issue of whether Rachel's due process rights were violated when the Casselberry City Commission refused to disqualify itself from presiding over Rachel's revocation hearing where the record was replete with evidence establishing bias against Rachel's was originally presented to the Florida trial court in Rachel's Petition for Writ of Certiorari. (App. G, 82 through 85). The trial court rendered its opinion on this issue in its July 17, 2001 Order. (App. C). Rachel's presented this issue to the Florida Fifth District Court of Appeal. That Court declined to address the issue finding that review of such issue lay only with the trial court given the procedural posture of the case. *Seminole Entertainment, Inc. v. City of Casselberry*, 813 So.2d 186, 188 (Fla. 5th DCA 2002). (App. A).

The Florida Supreme Court denied review of the case. *Seminole Entertainment, Inc. v. City of Casselberry*, 835 So.2d 269 (Fla. 2002). (App. D).

REASONS FOR GRANTING THE WRIT

I. Rachel's petition should be granted to resolve the conflict among both the federal circuit courts of appeal and the state courts as to whether a prompt judicial determination is required to satisfy the "prompt judicial review" safeguard mandated by this court in *Freedman v. Maryland*, 380 U.S. 51 (1965) and *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990).

In *Freedman v. Maryland*, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965), this Court established procedural safeguards required for statutory schemes necessary to prevent unconstitutional prior restraint of expression. Among these safeguards is "a prompt final judicial decision, to minimize the deterrent effect of an interim and possibly erroneous denial of a license." *Freedman*, 380 U.S. at 59. This Court reaffirmed the requirement of "prompt judicial review" in *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990). In *FW/PBS, Inc.*, six justices of the Court agreed that the "prompt judicial review" safeguard was necessary to protect against unconstitutional prior restraints. *FW/PBS, Inc.*, 493 U.S. at 230 (Opinion of Justice O'Connor, joined by Justices Stevens and Kennedy), and at 239 (Concurring opinion of Justice Brennan, joined by Justices Marshall and Blackmun).

Since this Court's decision in *FW/PBS, Inc.*, both the federal circuit courts of appeal and several state courts are divided over the meaning of the "prompt judicial review" requirement. The Fourth, Sixth, Ninth and Tenth Circuits have rejected any modification by *FW/PBS* of the traditional meaning of prompt judicial review and have maintained that a prompt judicial ***decision*** is necessary to

satisfy the requirement. *See East Brooks Books, Inc. v. City of Memphis*, 48 F.3d 220 (6th Cir. 1995); *Nightclubs, Inc. v. City of Paducah*, 202 F.3d 884 (6th Cir. 2000); *11126 Baltimore v. Prince George's County, MD*, 58 F.3d 988 (4th Cir. 1995); *Baby Tam & Co., Inc. v. City of Las Vegas*, 154 F.3d 1097 (9th Cir. 1998); *Z.J. Gifts D-4, L.L.C. v. City of Littleton*, 311 F.3d 1220 (10th Cir. 2002). Additionally, the South Carolina Supreme Court also held that prompt judicial review means a prompt decision – not access. *Harkins v. Greenville County*, 553 S.E. 2d 886 (S.C. 2000).

Further, several courts, including the Ninth Circuit, have held that a business which has had its license suspended or revoked is entitled to an automatic stay pending judicial review. *4805 Convoy, Inc. v. City of San Diego*, 183 F.3d 1108 (9th Cir. 1999) (city's scheme for suspending and revoking license unconstitutional in that it did not provide for an automatic stay pending judicial review); *Nightclub Management, Ltd. v. City of Canon Falls*, 95 F.Supp.2d 1027 (D. Minn. 2000) (although automatic stay went into effect pending city review of suspension/revocation, same was dissolved once city council rendered decision, thus law rendered unconstitutional); *Spokane Arcade, Inc. v. City of Spokane*, 1998 Wash. App. Lexis 1237 (Ct. App. Wash. 1998) (until city enacts a mandatory stay, ordinance is unconstitutional in its entirety); *JJR, Inc. v. City of Seattle*, 891 P.2d 720, 724 (Wash. 1995). This abatement or stay issue is simply an extension of the principle that a protected right cannot be eviscerated absent prompt judicial review on merits. In contrast, the Court of Appeals of Florida in this case and the First, Fifth and Eleventh

Circuits interpreted *FW/PBS, Inc. v. Dallas*, 493 U.S. 215 (1990) to require that a statute need only provide ***access*** to judicial review to pass constitutional muster.[6] *See Jews for Jesus, Inc. v. MBTA*, 984 F.2d 1319 (1st Cir. 1993); *TK's Video, Inc. v. Denton County, Tex.*, 24 F.3d 705 (5th Cir. 1994); and *Boss Capital, Inc. v. City of Casselberry*, 187 F.3d 1251 (11th Cir. 1999). Additionally, the Court of Appeals of Wisconsin held that prompt access to judicial review is sufficient. *City News & Novelty, Inc. v. City of Waukesha*, 604 N.W.2d 870 (Wis. Ct. App. 1999).

This conflict among the state and federal courts across the country over how to define a core protection of First Amendment rights requires resolution by this Court. The Court recognized the importance of the need to resolve this issue when it granted certiorari review on the question twice: once in the Court's 1999-2000 term and once in the 2000-2001 term. *See City News & Novelty, Inc. v. City of Waukesha*, 531 U.S. 278 (2001); *Thomas v. Chicago Park District*, 534 U.S. 316 (2002). Unfortunately, in each case the Court did not reach the merits of the issue because the

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[6] A Seventh Circuit case, *Graff v. City of Chicago*, 9 F.3d 1309 (7th Cir. 1993), has also been cited to support the argument that mere "access" satisfies the prompt judicial review requirement, but it is not a proper citation. *Graff* was a plurality, *en banc* decision rendered by twelve sharply divided judges. Judge Manion and four others concluded that common law certiorari satisfied the prompt judicial review requirement, although "access" *vis à vis* "decision" was never discussed. The principal opinion was not a majority opinion of the court. The seven judges who either concurred or dissented all indicated their disagreement with Judge Manion's conclusion that availability of judicial review satisfied the prompt judicial review requirement. Accordingly, the *Graff* decision may not be properly cited as holding that the prompt judicial review requirement is satisfied by judicial availability. *But see McDonald v. City of Chicago*, 243 F.3d 1021 (7th Cir. 2001).

Court found that the first case was not ripe for review and the second was decided on another issue.

In the case at bar, the issue is ripe for review and was directly addressed by the lower courts. The issue was raised by Rachel's in both the lower trial court and the Florida appellate court. The issue was directly addressed and decided by both courts. The City of Casselberry's Adult Entertainment Code at issue falls directly into the prior restraint schemes requiring the procedural safeguards mandated by *Freedman* and *FW/PBS, Inc.*[7]

The City of Casselberry Code contains a review provision that provides:

> Judicial Review. Any person who participated in a suspension or revocation hearing before the city commission and who is aggrieved by the decision of the city commission may immediately challenge the decision in any court of competent jurisdiction pursuant to the rules of procedure of that court. The record of the hearing shall consist of the complete records of the proceedings before the city commission. The city commission's decision shall be promptly reviewed by the court.

Section 14-93(d), Casselberry Code. (App. F). However, there is no requirement under Florida law, the Florida Rules of Appellate Procedure or the Casselberry City Code guaranteeing that such a review be promptly decided or

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[7] As previously stated, Rachel's is an adult business which provides erotic dancing for the enjoyment of its patrons – entertainment which this Court has repeatedly held is entitled to a certain level of First Amendment protection.

providing a stay pending final judicial determination of Casselberry's revocation order.

Under the Florida Constitution only the Supreme Court of Florida can enact rules of procedure. *Holden Avenue Inter-Neighborhood Council, Inc. v. County of Orange*, 719 So.2d 1002, 1003 (Fla. 5th DCA 1998); Article V, Section 2.(a), Florida Constitution. A Florida municipality does not have the power to provide or guarantee prompt judicial decision – this is a Florida legislative or judicial function. Casselberry's code is in effect a powerless provision that has no legal effect.

This case presents a salient example of why an automatic stay and prompt judicial determination on the merits must be an absolute requirement under the First Amendment. This Court should grant certiorari review of the Florida court's opinion below to resolve the conflict among both the federal and state courts as to whether a prompt judicial determination is required to satisfy the "prompt judicial review" safeguard mandated by this Court in *Freedman v. Maryland*, 380 U.S. 51 (1965) and *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990).

II. Rachel's petition should be granted because the lower court's decision conflicts with several opinions from this court finding due process violations where the record was replete with evidence establishing bias against Rachel's, but the City Commission refused to disqualify itself from presiding over the revocation hearing.

A basic and fundamental component of due process is a party's entitlement to a neutral and unbiased fact finder.

This Court has repeated this refrain many times. This entitlement equally applies to judges and bodies which serve a quasi-judicial function. As explained by this Court in *Withrow v. Larkin*, 421 U.S. 35 (1975):

> Concedingly, a "fair trial in a fair tribunal is a basic requirement of due process." *In re: Murchison,* 349 U.S. 133, 136, 99 L.Ed. 942, 75 S.Ct. 623 (1955). This applies to administrative agencies which adjudicate as well as to courts. *Gibson v. Berryhill*, 411 U.S. 564, 579, 36 L.Ed. 2d 488, 93 S.Ct. 1689 (1973). Not only is a biased decision maker constitutionally unacceptable but "our system of law has always endeavored to prevent even the probability of unfairness." *In re: Murchison, supra* at 136, 99 L.Ed. 942, 75 S.Ct. 623; cf. *Tumey v. Ohio*, 273 U.S. 510, 532, 71 L.Ed. 749, 47 S.Ct. 437, 50 ALR 1243 (1927). In pursuit of this end, various situations have been identified in which experience teaches that the probability of actual bias on the part of a judge or decision maker is too high to be constitutionally tolerable. Among these cases are those in which the adjudicator has a pecuniary interest in the outcome and in which he has been the target of personal abuse or criticism from the party before him.

Withrow v. Larkin, 421 U.S. 35, 46-47 (1975). Other opinions from this Court reinforce this proposition. *See Ward v. Monroeville*, 409 U.S. 57 (1972); *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970) (impartial decision maker essential to due process); *Bell v. Burson*, 402 U.S. 535 (1971).

In this case, the bias displayed by the Casselberry City Commission was so pervasive that the refusal to disqualify itself constituted a due process violation. The

Casselberry mayor was embroiled in a contested election prior to the initiation of revocation proceedings against Rachel's. During the election, the mayor ran on a platform involving "strict enforcement of the illegal activities going on inside strip bars." He also referred to these businesses as "[t]he strip bars with all their money and corrupting influence, continued to negatively impact our community. We should focus on improving our standards. . . . " In fact the antagonism between the mayor, city officials and the owners of Rachel's was deep and long-lasting. Prior Casselberry City Commission hearings revealed the mayor's hostility toward the owners of Rachel's and his belief that illegal activity was occurring at the club. During an April 7, 1997 City Commission hearing, the mayor stated:

> In that investigation[8] that started out at Puzzles and **spilled over into Rachel's**[9], there are arrests made and there are signed affidavits that talk about a number of different things. The proliferation of drugs. High level staff at the establishments getting involved. Talking about underaged, forced under-aged drinking, talking about forced prostitution, and the question I always have to keep coming back is how is this good public policy to establish a precedent and a monopoly for two former all-night clubs?
>
> * * *

[8] This "investigation" was a subject of discussion during the revocation proceedings.

[9] All emphasis in this petition has been added unless otherwise noted.

> I've said it before, the strategy has been to confuse, to intimidate, to divide and to conquer. I'm not confused. I will not be intimidated. I do believe that the city of Casselberry will come together and not be divided, and the city of Casselberry will not be conquered.

The mayor also approached a Florida legislator hoping to close down the adult clubs in Casselberry. The mayor had also previously read affidavits regarding allegations of under-aged drinking and illegal activity at Rachel's. This is the same mayor that presided over Rachel's hearing, ruled on all of the evidentiary issues and participated in the ultimate fact finding decision.

Additionally, Rachel's alleged that the city manager had discussions with the city commission regarding the criminal investigation of Rachel's prior to the evidentiary hearing. The animus with this business was so pervasive and scarred that one of the commissioners was previously employed as an undercover operative and wore a "wire" in an attempt to have one of Rachel's owners arrested.

Despite the record evidence regarding the City Commission's bias, the trial court below relied on this Court's opinion in *Hortonville Joint School District No. 1 v. Hortonville Educ. Ass'n*, 426 U.S. 482 (1976) for the proposition that a legislative body, even while acting in a quasi-judicial capacity, is not subject to disqualification based upon claims of political bias. The trial court reasoned:

> This Court is also guided by the United States Supreme Court's opinion in *Hortonville Joint School District #1 v. Hortonville Education Association, et al.*, 426 U.S. 482 (1976). In *Hortonville*, the court ruled that political opposition or

> political bias of school board members against the teachers' union was not sufficient to disqualify elected officials. *Id.* As such, the court would not interfere with the exercise of the local government's discretion notwithstanding evidence that the elected officials had, in the context of political speech, made statements from which one could infer an anti-union bias. *Id.* The fact that the elected officials may have expressed political and policy views as a legislator or politician on an issue that may potentially come before them in a quasi-judicial proceeding does not prevent them from deciding a particular case fairly. *Id.* In the instant case, none of the alleged prejudicial statements made by the City Commissioners related specifically to the license revocation proceedings. Therefore, there was no basis for the City Commissioners to disqualify themselves.

Seminole Entertainment, Inc. v. Casselberry, 8 Fla.L.Weekly Supp. 613a (Fla. 18th Jud. Cir. 2001) (App. C).

However, the trial court's reasoning misconstrues the *Hortonville* case. *Hortonville* actually reinforced *Ward v. Monroeville*, 409 U.S. 57 (1972) that disqualification is appropriate if supported by the record. As this Court in *Hortonville* explained:

> Respondents have failed to demonstrate that the decision to terminate their employment was infected by the sort of bias that we have held to disqualify other decision makers as a matter of federal due process.

Hortonville, 426 U.S. at 496. In fact, this Court categorized the school board's decision as one more in line with policy-making rather than the imposition of discipline:

> The board's decision was only incidentally a disciplinary decision; it had significant governmental and public policy dimensions as well.

Id. at 495.

In fact, the obvious bias demonstrated by Rachel's led the Rachel's I appellate panel to conclude that *Hortonville* was inapplicable. The unanimous court in Rachel's I concluded that:

> In this case, Rachel's has established more than mere political bias or an unfriendly political atmosphere. It was denied the right to challenge, through cross-examination, the testimony of the principal witness against it. The evidentiary rulings by Mayor Pronovost were not merely erroneous but rather reflect a bias so persuasive as to have rendered the proceedings violative of the basic fairness component of due process.

Seminole Entertainment, Inc. v. City of Casselberry, 811 So.2d 693, 696-97 (Fla. 5th DCA 2001).[10] (App. B). Unfortunately, the majority of the Rachel's II panel ignored the holding of the Rachel's I panel because of the unique procedural posture of the cases. The Rachel's II panel affirmed the trial court without addressing this due process issue. Judge Cobb, the only judge who sat on both panels, dissented in the Rachel's II decision. This left

[10] The Rachel's I opinion was an appeal from the denial of a temporary injunction filed in a companion declaratory judgment action. Due to the unique procedural posture, the Rachel's I opinion was handed down after the trial court rendered its July 17, 2001 decision in this action, but before the Rachel's II opinion was rendered by another panel of the Fifth District Court of Appeals of Florida.

Rachel's in the unique position of having a majority of the appellate judge's who considered the matter finding a due process violation, yet the trial court's opinion was affirmed.

CONCLUSION

This Court should grant this petition to resolve the deep and important conflict among both state and federal courts as to the meaning of the "prompt judicial review" safeguard in First Amendment prior restraint cases. The lower court's opinion, if it is allowed to stand, will sow further confusion as to the proper meaning of "prompt judicial review".

Additionally, this Court should accept this case to remedy what most assuredly is a strange series of rulings below and which utterly conflict with this Court's opinions – which mandate that a defendant in a quasi-judicial proceeding is guaranteed both a fair hearing and a neutral fact finder.

Respectfully submitted,

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